

Exhibit A

STATE OF MICHIGAN
IN THE SUPREME COURT

NEXTEER AUTOMOTIVE
CORPORATION,

Supreme Court No. 153413

Plaintiff/Counter-Plaintiff/Third-
Party Defendant-Appellee,

Court of Appeals No. 324463

v

Saginaw Circuit Court
LC No. 13-021401-CK

MANDO AMERICA CORPORATION, TONY
DODAK, THEODORE G. SEEGER, TOMY
SEBASTIAN, CHRISTIAN ROSS, KEVIN
ROSS, ABRAHAM GEBREGERIS,
RAMAKRISHNAN RAJA
VENKITASUBRAMONY, TROY STRIETER,
JEREMY J. WARMBIER, and SCOTT
WENDLING,

Defendants-Appellants.

**BRIEF AMICUS CURIAE OF MICHIGAN DEFENSE TRIAL COUNSEL, INC.
IN SUPPORT OF DEFENDANTS-APPELLANTS**

DICKINSON WRIGHT PLLC
Phillip J. DeRosier (P55595)
500 Woodward Avenue, Suite 4000
Detroit, MI 48226
(313) 223-3500

*Attorneys for Amicus Curiae Michigan Defense
Trial Counsel, Inc.*

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STATEMENT IDENTIFYING ORDER APPEALED AND RELIEF SOUGHT

Amicus Curiae Michigan Defense Trial Counsel, Inc. submits this brief in support of Defendants-Appellants' application for leave to appeal from the Court of Appeals' February 11, 2016 published opinion. In that opinion, the Court of Appeals held that Defendant-Appellant Mando America Corporation ("Mando") waived its contractual right to arbitrate Plaintiff Nexteer Automotive Corporation's ("Nexteer") claims relating to alleged violations of a nondisclosure agreement ("NDA") when Mando agreed to entry of a preliminary case management order ("CMO") indicating that the agreement's arbitration provision was "not applicable" – at least not at the time the order was entered.

The problem is that the CMO was entered during initial proceedings that were limited in scope and addressed only Nexteer's request for preliminary injunctive relief, in which it was seeking to enforce employment agreements signed by the individual Defendants. Not only was there no arbitration provision in those agreements, but the NDA expressly permitted Nexteer to seek a "preliminary injunction or preliminary judicial relief" notwithstanding the arbitration clause. Moreover, the box on the CMO indicating "waive[r]" of Mando's right to arbitrate Nexteer's substantive claims relating to the NDA was *not* checked. In holding that Mando's agreement to entry of the CMO nevertheless resulted in an "express waiver" of its right to arbitrate Nexteer's claims, the Court of Appeals overlooked both the order's ambiguous nature and the limited context in which the order was entered.

Under the Court of Appeals' opinion, *any* contractual right – not just to arbitration – is subject to waiver merely by dint of a party's agreement to the entry of an initial case management order – and a vague one at that. Because the Court of Appeals' published decision sets a dangerous precedent, this Court's intervention is warranted.

STATEMENT OF QUESTION INVOLVED

Should the Court grant leave to appeal to consider the extent to which a party's contractual right to arbitration may be waived by an ambiguous notation in a preliminary case management order?

The trial court would presumably answer: Yes.

The Court of Appeals would presumably answer: No.

Defendants-Appellants answer: Yes.

Plaintiffs-Appellees answer: No.

MDTC answers: Yes.

STATEMENT OF INTEREST

Michigan Defense Trial Counsel, Inc. (“MDTC”) is a business association organized and existing to advance the knowledge and improve the skills of defense lawyers, to support improvements in the adversary system of jurisprudence in the operation of the Michigan courts, and to address the interests of the legal community in Michigan. MDTC appears before the Court as a representative of defense lawyers and their clients in Michigan, a significant portion of whom are potentially affected by the issue currently before this Court.

An important aspect of MDTC’s activities is representing the interests of its members in matters of importance before state and federal courts. Thus, MDTC regularly submits amicus curiae briefs to the Michigan Court of Appeals and this Court advocating the interests of its members. The Court of Appeals opinion in this case raises a serious issue concerning whether a party’s contractual right to arbitrate a dispute can be waived by an ambiguous notation in a preliminary case management order that was entered early in the case to govern initial, limited proceedings relating to a request for preliminary injunctive relief. MDTC is uniquely situated to address the serious ramifications of the Court of Appeals’ decision.

I. STATEMENT OF FACTS

Amicus curiae Michigan Defense Trial Counsel (“MDTC”) relies on Defendants-Appellants’ statement of facts.

II. STANDARD OF REVIEW

MDTC relies on Defendants-Appellants’ statement of the applicable standards for reviewing their application for leave to appeal.

III. ARGUMENT

THE COURT OF APPEALS ERRED IN FINDING A CONTRACTUAL RIGHT TO ARBITRATION TO BE WAIVED ON THE BASIS OF AN AMBIGUOUS NOTATION IN A PRELIMINARY CASE MANAGEMENT ORDER

As explained in Mando’s application for leave to appeal, the CMO at issue was merely preliminary, in that it was solely intended to memorialize the parties’ initial case management teleconference with the court. It did not purport to set forth the parties’ positions on every conceivable issue in the case. Indeed, at the time the order was entered, Mando had not yet answered Nexteer’s complaint, and the only matter before the court was Nexteer’s request for a temporary restraining order (“TRO”) and preliminary injunction prohibiting the individual Defendants from working for Mando pending final resolution of Nexteer’s claim that Mando was part of a scheme to misuse confidential information in violation of the NDA.

The CMO’s preliminary nature is apparent from its face. The order stated that it was based on what the Court had been “preliminarily advised” by the parties. The order further noted that Mando’s affirmative defenses were not yet due and granted Nexteer leave to amend its complaint. The order did not contain dates for submitting witness and exhibits lists. Finally, and perhaps most importantly, the order restricted “initia[l]” discovery to the “limited” issue of

which version of the individual Defendants' employment agreements (which did not contain arbitration provisions) controlled for purposes of determining their ability to work for Mando.

The CMO was thus intended to perform precisely as MCR 2.401 envisions, i.e., to "facilitate the progress of the case." MCR 2.401(B)(2)(a). Like all case management orders (if not more so), the order was subject to change. Indeed, the limited scope of the order *necessarily* required that it be amended after the court resolved Nexteer's motion for a preliminary injunction. There certainly is nothing in the order to suggest that by stipulating to it, Mando intended to waive its right to arbitrate Nexteer's underlying claims – especially given that the *only* box on the CMO indicating that arbitration was "waived" *was not checked*.

Moreover, it is debatable whether agreement to an early case management order should ever give rise to waiver of an important contractual right. In *Wachovia Bank, Nat'l Assn v Preston Lake Homes, LLC*, 750 F Supp 2d 682 (WD Va, 2010), a bank and its customer entered into loan agreements containing a "clear waiver of the parties' right to seek a jury trial." *Id.* at 693 n 10. Despite that provision, the bank "agree[d] to a scheduling order that set the case for a jury trial." *Id.* Rejecting the customer's argument that the bank had thus "waived the right to enforce th[e] [jury trial] waiver," the court found "that the mere fact that the court set the case for a jury trial in the court's initial scheduling order does not constitute a waiver of the right to enforce this term of their agreement." *Id.* The same argument could be made here – the fact that the court's initial case management order indicated the parties' "preliminary" view that the arbitration provision was "not applicable" should not be deemed a waiver of Mando's right to enforce that provision once it became apparent that it *was* applicable.

Regardless, even if Mando's stipulation to the CMO could be construed as a waiver, case management orders are not written in stone. *United States v Kramer*, 770 F Supp 954, 963 (D

NJ, 1991) (observing that a CMO “set forth the initial management of the case It did not forever set the management of the case in stone.”). On the contrary, they are flexible based on the needs of a given case. To that end, MCR 2.401 authorizes the entry of “[m]ore than one such order” in a case, MCR 2.401(B), and provides parties with the ability to seek modification of a scheduling order. MCR 2.401(B)(2)(d)(iii). To allow a preliminary case management order to constitute a waiver of a contractual right – here, the right to arbitration – is simply untenable.

Because the Court of Appeals’ decision is published, it has serious ramifications. Under the Court of Appeals’ analysis, parties may face waiver of important contractual rights through the entry of an early case management order before they have even had a chance to answer the complaint. Indeed, that is precisely what happened here. The Court should not allow such dangerous precedent to stand.

IV. CONCLUSION

MDTC respectfully submits that the Court should grant leave to appeal, reverse the Court of Appeals’ decision, and reinstate the trial court’s order compelling arbitration.

Respectfully submitted,

DICKINSON WRIGHT PLLC

/s/ Phillip J. DeRosier

By: _____
 Phillip J. DeRosier (P55595)
 500 Woodward Avenue, Suite 4000
 Detroit, MI 48226
 (313) 223-3500

*Attorneys for Amicus Curiae Michigan
 Defense Trial Counsel, Inc.*

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